

**State of Vermont
WATER RESOURCES BOARD**

**Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook,
Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated)**

CHAIR'S ORDER

The filing schedule for the above-referenced appeals, last modified on November 6, 2002, requires, among other things, that all parties other than ANR file their direct prefiled testimony and exhibits on or before November 15, 2002. (Chair's Order, Nov. 6, 2002, at 1.) On November 12, 2002, the Water Resources Board (Board) received a Motion for Enlargement of Time and a Motion for Summary Judgment from VNRC. VNRC's Motion for Enlargement of Time seeks to continue the November 15, 2002, filing deadline "until after the Board has ruled on the pending motion for summary judgment." The Motion for Enlargement of Time represents that "no party to the case objects to such enlargement."

On November 13, 2002, VNRC filed a Motion for Limited Enlargement of Time with the Board. In its Motion for Limited Enlargement of Time, VNRC requests until November 21, 2002, to prefile its direct testimony and exhibits. VNRC avers scheduling difficulties with its witnesses as grounds for this motion and represents that the other parties in these appeals have no objections to its request.

Board Rule of Procedure 8(D) provides as follows:

Any period of time prescribed by these Rules or by order, except the time for filing a notice of appeal, may be enlarged by the filing of a stipulation, signed by all parties or their representatives, setting forth clearly and specifically the period of time enlarged and the date to which said period is enlarged, and stating the reason for the enlargement of time. A request to enlarge time by stipulation may be granted by the Board, Chair, or a referee appointed to hear the matter provided that such enlargement will not result in undue delay or disruption of the Board's docket.

The November 6, 2002, filing schedule provides that "The Board may waive the filing requirements set forth herein upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties." (Chair's Order, Nov. 6, 2002, at 4.)

At the prehearing conference in this matter, considerable attention was devoted to assigning the burden of production. ANR argued that the Appellants should carry the burden of production because that would help define the issues in a manner that would enable ANR to prepare its case. The Appellants countered that ANR should carry the

burden of production because they needed to know more about the basis of the permits at issue before they could fairly present their direct evidence. The Chair assigned the burden of production to ANR because ANR was in the best position to know the details of its permitting decisions. The Chair explained that ANR would be able to respond to the prefiled arguments and evidence of the Appellants through prefiled rebuttal evidence and live cross examination. (Prehearing Conference Report and Order, Sept. 20, 2002, at 5.)

The issue was raised at the prehearing conference as to whether it would be appropriate to clarify the issues on appeal and to explore opportunities for narrowing or refining issues. The Appellants objected to providing further information about the issues they raised, arguing that they would need additional information from ANR before further explaining the bases for their appeals. ANR argued that clarifying the issues on appeal would assist with the preparation of its direct evidence. The Chair resolved this dispute as follows:

ANR must explain the legal and factual basis for the Permits in its direct evidence. Following ANR's filing of its direct evidence, the Appellants will be required to file their direct evidence, which will further define the issues they identified in their notices of appeal. ANR and the Appellants will then have an opportunity to file rebuttal evidence. In this fashion, the Appellants will initially obtain additional information about the Permits, and ANR will then obtain additional information about the appeals. ANR will be able to fully respond to the evidence presented by the Appellants and vice versa.

With the approval of the Chair, the parties agreed that they would file legal memoranda with their evidence.

(Prehearing Conference Report and Order, Sept. 20, 2002, at 9-10.) The Prehearing Conference Report and Order further provides as follows: "Because of the close connection between legal and factual issues in these appeals and the need to move forward with a hearing on the merits expeditiously, prehearing motions on preliminary issues are discouraged." (*Id.* at 14.)

As scheduled, ANR prefiled its direct evidence on October 18, 2002. The November 15, 2002, deadline for the Appellants to prefile their direct evidence was initially established by a Chair's Order issued September 24, 2002. (Chair's Order, Sept. 24, 2002, at 1.) The September 24, 2002, Chair's Order also established December 13, 2002, as the filing deadline for prefiled rebuttal testimony and exhibits. (*Id.* at 2.) The hearing in this matter was scheduled for February 18 through February 21, 2003, as may be necessary, in the September 20, 2002, Prehearing Conference Report and Order.

(Prehearing Conference Report and Order, Sept. 20, 2002, at 17.)

The indefinite filing extension requested by VNRC would be unfair to ANR and would unduly delay or disrupt the Board's docket, in contravention of Procedural Rule 8(D), the September 20, 2002, Prehearing Conference Report and Order, and the November 6, 2002, Chair's Order. In the absence of pretrial discovery, the prefiled direct evidence of the Appellants is the sole means for ANR to formally ascertain the details underlying the appeals in advance of the hearing. To allow the Appellants at this juncture to avoid disclosing the details of their cases would violate the give-and-take arrangements of the prehearing conference that were memorialized in the Prehearing Conference Report and Order.

Suspending the filing deadlines in this appeal until after the Board resolves VNRC's Motion for Summary Judgment would delay the hearing in this matter, if still necessary, by at least several weeks. At this juncture, without having heard from the other parties, the Board is not prepared to decide whether the Motion for Summary Judgment will obviate the need for a hearing. Due to the complexity and importance of the issues presented by these appeals, the Board will not postpone the hearing without first deciding that VNRC's Motion for Summary Judgment will be granted. That decision can be made only after allowing the other parties in this case to file responses to VNRC's Motion for Summary Judgment and allowing the parties to present oral argument.

Accordingly, it is hereby **Ordered**:

VNRC's Motion for Enlargement of Time is **denied**. VNRC's Motion for Limited Enlargement of Time is **granted**. To accommodate the extension of time for the Appellants to prefile their direct evidence, to establish a deadline for the parties to respond to VNRC's Motion for Summary Judgment, to extend the deadline for the parties to prefile their rebuttal evidence and to afford the Board sufficient time to suspend the filing deadline for rebuttal evidence if appropriate after considering VNRC's Motion for Summary Judgment, and to make related adjustments to the filing schedule for these appeals, the scheduling order for these appeals is amended as follows:

1. If the parties would like the Board to conduct a site visit in connection with the hearing, the parties shall work together to develop a joint proposed site-visit itinerary so that the Board's time is used efficiently during the site visit. The parties are encouraged to ensure that the site visit not take more than half a day. The parties shall identify the specific stations and sequence of stations they wish the Board to view, and then do a dry run of the proposed site visit to confirm the time sequence involved.

The parties shall file their request for a site visit and proposed site-visit itinerary on or before **4:30 p.m., November 12, 2002**. To the extent the parties cannot agree concerning the need for a site visit or the relevancy of any proposed site-visit itinerary item, they should communicate their disagreement in writing in a submission to the Board so the Chair may rule on the scope and content of any site visit. Any site visit in this matter will take place on **November 19, 2002**.

2. On or before **4:30 p.m., November 21, 2002**, all parties other than ANR shall file final lists of direct witnesses and exhibits. They also shall file all direct prefiled testimony and exhibits they intend to present. For each expert witness, they shall file a resume or other statement of qualification. All reports and other documents upon which an expert witness relies in making his or her professional opinion shall be filed as prefiled exhibits.

Prefiled direct exhibits which are larger than 8½ by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board** and be made available for inspection and copying by any party prior to the hearing.

Each of the Appellants shall file a memorandum of law with its prefiled direct evidence.

3. On or before **4:30 p.m., November 27, 2002**, VNRC shall file any request for oral argument on its Motion for Summary Judgment, and any party wishing to do so shall file a response to VNRC's Motion for Summary Judgment. Said responses shall be supported by legal memoranda and any requests for oral argument. *See* Procedural Rule 36.
4. Should oral argument be requested with respect to VNRC's Motion for Summary Judgment, it shall take place on **December 10, 2002**. The time and location of any oral argument on VNRC's Motion for Summary Judgment shall be announced in a subsequent notice.
5. On or before **4:30 p.m., December 19, 2002**, all parties shall file final lists of rebuttal witnesses and exhibits and prefiled rebuttal testimony and exhibits they intend to present. For each expert witness, they shall file a resume or other statement of qualification. All reports and other documents upon which an expert witness relies in making his or her professional opinion shall be filed as prefiled exhibits.

Prefiled rebuttal exhibits which are larger than 8½ by 11 inches must only be identified to the parties, **but one copy of all such exhibits must be filed with the Board** and be made available for inspection and copying by any party prior to the hearing.

The parties may file memoranda of law with their prefiled rebuttal evidence.

6. No individual may be called as a witness in this matter if he or she has not filed prefiled testimony or exhibits in compliance with this Order. All reports and other documents that constitute substantive testimony must be filed with the prefiled testimony. If prefiled testimony has not been submitted by the date specified, the witness may not be permitted to testify.
7. On or before **4:30 p.m., December 30, 2002**, any party may file in writing any evidentiary objections to prefiled testimony and exhibits previously filed. If objections are not timely filed, they shall be deemed waived. Any objections shall be supported by legal memoranda.
8. Pursuant to Procedural Rule 32(B), the parties are **hereby Ordered** to retain a qualified court stenographer for the hearing in this matter. One copy of a transcript of the proceedings must be filed with the Board as expeditiously as possible at no cost to the Board. The eleven Appellants and ANR shall each be responsible for one twelfth of the costs of having the hearing stenographically recorded and of providing a transcript to the Board. The parties shall coordinate with each other to ensure that the stenographer is timely retained and compensated.
9. On or before **4:30 p.m., January 9, 2003**, any party may file in writing any responses to evidentiary objections filed in accordance with item 7, above. If responses are not timely filed, they may be excluded. Any responses to evidentiary objections shall be supported by legal memoranda.
10. On or before **4:30 p.m., January 15, 2003**, all parties shall submit a single, combined list of all prefiled testimony and exhibits.
11. On or before **4:30 p.m., January 15, 2003**, the parties shall file any stipulations. These may be in the form of joint statements of fact or proposed joint decisions.
12. On or before **4:30 p.m., January 15, 2003**, the parties shall file any proposed findings of fact, conclusions of law, and orders, including any proposed permit

and/or conditions.

13. The parties shall work together to develop a joint proposed hearing agenda. The parties shall prepare their cases and coordinate with each other in an effort to allow the hearing in this matter to be completed as expeditiously as possible. The parties shall file their proposed hearing agenda on or before **4:30 p.m., January 15, 2003.**
14. The Chair or his designee will conduct a second prehearing conference on **January 23, 2003, at 9:00 a.m. at the Board's office in Montpelier, Vermont.** The purpose of this prehearing conference is to address any pending evidentiary objections, hearing-agenda issues, or other matters requiring rulings preliminary to the hearing in this matter. Any party wishing to participate in this conference by telephone should so advise the Board's Secretary, Karen Dupont (802-828-2870) on or before **12:00 noon on January 21, 2003.** The Board's staff will arrange the conference call.
15. The hearing in this matter is scheduled to take place from **Tuesday, February, 18 through Friday, February 21, 2003,** as may be necessary. The hearing may take place at a public facility near the water resources at issue. The specific times, dates, and location of this hearing shall be announced in a subsequent notice.
16. Within **two weeks after the completion of the hearing,** any party may file any revised or supplemental proposed findings of fact, conclusions of law, and orders, including any proposed permit conditions.
17. The Board may waive the filing requirements set forth herein upon a showing of good cause, unless such waiver would unfairly prejudice the rights of other parties.
18. Parties shall file an **original and six collated copies** of motions, legal memoranda, and any other documents filed with the Board, and mail one copy to each of the persons listed on the Board's Certificate of Service. (Parties are not required to serve filings on persons listed under the "For Your Information" section of the certificate of service.)

Legal memoranda accompanying direct evidence shall be no more than 25 pages, double-spaced. Any legal memoranda accompanying rebuttal evidence shall be no more than 15 pages, double-spaced. Proposed findings of fact and conclusions of law shall be no more than 50 pages, double-spaced. See Procedural Rule 10.

All prefiled testimony and exhibits and all legal memoranda must be clearly organized with respect to the issues and watersheds addressed. All prefiled testimony must be double-spaced and line numbered. All prefiled testimony and accompanying exhibits must be placed in a binder and contain a table of contents, if the evidence in total is more than 50 pages in length. See Procedural Rule 30(D). Parties should file an original and 6 collated copies of any prefiled testimony. The parties should also provide the Board with an original and 6 collated copies of any exhibits offered into evidence. See Procedural Rules 9 and 30.

Each party's prefiled testimony and other prefiled exhibits should be accompanied by a list of exhibits. Each party should label its exhibits, including any prefiled testimony, with its name. The labels should contain the words WATER RESOURCES BOARD, Re: Morehouse Brook, et al., Nos. WQ-02-04, -05, -06, and -07 (Consolidated), the number of the exhibit, and a space for the Board to mark whether the exhibit has been admitted and to mark the date of admission. The completed labels should be affixed to all exhibits prior to submission to the Board. Label stickers are available from the Board upon request.

With respect to labeling, each party is assigned letters as follows: "CW" for the City of Winooski, "CLF" for CLF, "VNRC" for VNRC, "CSB" for the City of South Burlington, and "ANR" for ANR. Exhibits should be assigned consecutive numbers. For example, the City of Winooski should number its exhibits CW-1, CW-2, CW-3, etc. If an exhibit consists of more than one piece (such as a site plan with multiple sheets), labels should be used for each piece, e.g., CW-2A, CW-2B, CW-2C, etc. Each page of a multi-page exhibit need not be labeled. However, every exhibit, or every labeled piece of an exhibit must be paginated from front to back. Thus, exhibits or labeled pieces of exhibits containing multiple documents or attachments must be repaginated so that the exhibit or labeled piece of exhibit begins with page 1 and the page numbers continue sequentially to the last page.

Each exhibit list should state the full name of the party at the top and the Board's case name and number. There should be three columns, from left to right: NUMBER, DESCRIPTION, and STATUS. An example follows:

CITY OF WINOOSKI'S LIST OF EXHIBITS

Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook,
Nos. WQ-02-04, -05, -06, and -07 (Consolidated)

<u>Number</u>	<u>Description</u>	<u>Status</u>
CW-1	Prefiled Direct Testimony of _____	
CW-2	Permit Application filed with ANR on _____.	
CW-3A-D	Survey dated _____, sheets 3A through 3D	

The Board will use the "Status" column to mark whether or not the exhibit has been admitted.

Exhibits offered to ANR for its consideration in evaluating the permit request, if they are to be considered by the Board *de novo*, must be introduced into the evidentiary record for this proceeding. Exhibits attached to briefs, if they are to be considered by the Board, must also be introduced into the evidentiary record for this proceeding.

19. Pursuant to Procedural Rule 23, any objections to this Order must be filed on or before **4:30 p.m., November 19, 2002**. The filing of an objection shall not automatically toll that portion of this Order to which an objection is made.

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Dated at Montpelier, Vermont, this 15th day of November, 2002.

WATER RESOURCES BOARD
By its Chair

/s/ David J. Blythe

David J. Blythe